

I. STATEMENT OF THE CASE

Petition S.E. 09-2, filed on January 13, 2009, requests a special exception in the R-60 Zone to operate a “group day care home”¹ for up to 12 children in the lower level of an existing single-family, detached home at 11411 Sherrie Lane, Wheaton, Maryland. Petitioner, who owns and resides in the home, has been operating a licensed child care business (*i.e.*, a “family day care home”) in their home for up to 7 children for nearly five years (Exhibit 28, p. 5). A family day care home is a permitted use in the R-60 Zone, but increasing the number of children from 7 to 12 would transform the facility into a “group day care home” under Zoning Ordinance §59-A-2.1, and a special exception is required to operate a group day care home in the R-60 Zone. The day care facility is called “Loving Family Childcare.”

Under the provisions of the Zoning Ordinance, §59-G-1.12, the Hearing Examiner is authorized to hear and decide this type of petition. On January 16, 2009, the Office of Zoning and Administrative Hearings issued a notice that the public hearing would be held before the Hearing Examiner on June 12, 2009, at 9:30 a.m., in the Second Floor Hearing Room of the Stella B. Werner Council Office Building (Exhibit 26).

The Technical Staff of the Maryland-National Capital Park and Planning Commission (“M-NCPPC”) reviewed the petition and, in a report dated April 29, 2009, recommended approval with conditions (Exhibit 28).²

¹ A “group day care home” is one of three types of “child day care facilities” defined in Zoning Ordinance §59-A-2.1. The other two are “family day care homes” for up to 8 children and “child day care centers” for 13 or more children. A “group day care home” is defined in §59-A-2.1 as:

A dwelling in which child day care services are provided:

- a. in the home where the licensee is the provider and is a resident;
- b. for 9 but not more than 12 children including the children of the provider, and;
- c. where staffing complies with state and local regulations, but no more than 3 non- resident staff members are on site at any time.

² The Technical Staff report is frequently quoted and paraphrased herein.

The hearing was convened, as scheduled on June 12, 2009, and testimony was presented in support of the petition by Petitioner Marie N. Fanfan, who was represented at the hearing by attorney David Gardner, Esquire. The People's Counsel, Martin Klauber, Esquire attended the beginning of the hearing and indicated his support for the petition. Tr. 6. There has been no response from the community, either for or against. Exhibit 28, p. 8. The record was held open until June 26, 2009, to permit the Petitioner to submit some revised plans and a copy of Petitioner's current license.

Petitioner failed to do so, but the Hearing Examiner reopened the record on July 20, 2009 (Exhibit 33), at the request of Petitioner's counsel, to receive the late documents, which were filed on July 17, 2009. Exhibits 31 and 31(a) – (d). An updated version of the license (Exhibit 32), showing that it is "non-expiring," was also received from the Maryland Child Care Administration, and it was admitted. Since the only changes made to the plans were minor and were discussed at the public hearing, the record closed immediately, on July 20, 2009.

There is no opposition in this case, and the special exception is supported by the evidence in the record. The Hearing Examiner will therefore grant the petition.

II. FACTUAL BACKGROUND

A. Subject Property and Surrounding Neighborhood

The proposed group day care home would operate in an existing, single-family, detached, rambler, with a basement, at 11411 Sherrie Lane, Wheaton, Maryland. It is located on the east side of Sherrie Lane, between Veirs Mill Road and Fenimore Road, approximately 350 feet north of the intersection on Sherrie Lane and Veirs Mill Road. The property's legal description is Lot 33, Block 40, of the Wheaton Hills Subdivision, and it consists of approximately 6,600 square feet of R-60 zoned land.

The property is rectangular in shape, and according to Technical Staff, has 60 feet of frontage on Sherrie Lane. Vehicular access to the property is via a concrete driveway along the south

property line. There is no garage, but the driveway, which is 43 feet deep, can hold two cars. There is also on-street parking available in front of the property. The Site's location can be seen on the following aerial-photo map from page 3 of the Technical Staff report (Exhibit 28):



As observed by Technical Staff (Exhibit 28, pp. 6-7), the property is improved with a one-family, detached dwelling, the basement of which is currently being used as a residence and a family day care for 7 children. The driveway narrows to a walk way midway into the side yard, leading to the rear portion of the property through a gate. The property is enclosed with a four-foot high chain link fence. Petitioner also installed a 6-foot high wooden fence, just inside of the metal fence, on the sides and rear of the home. Tr. 23-25. It fully encloses the rear yard and has a gate. The home, driveway and zoning notice sign can be seen in the following photo from the Staff report (Exhibit 28, p. 6):



As shown in the above photo, the front yard can be accessed by foot from the street through a walkway that splits into two parts, one leading directly to the front entrance of the dwelling and the other wrapping around the north side yard leading into the rear yard through a gate in the wooden

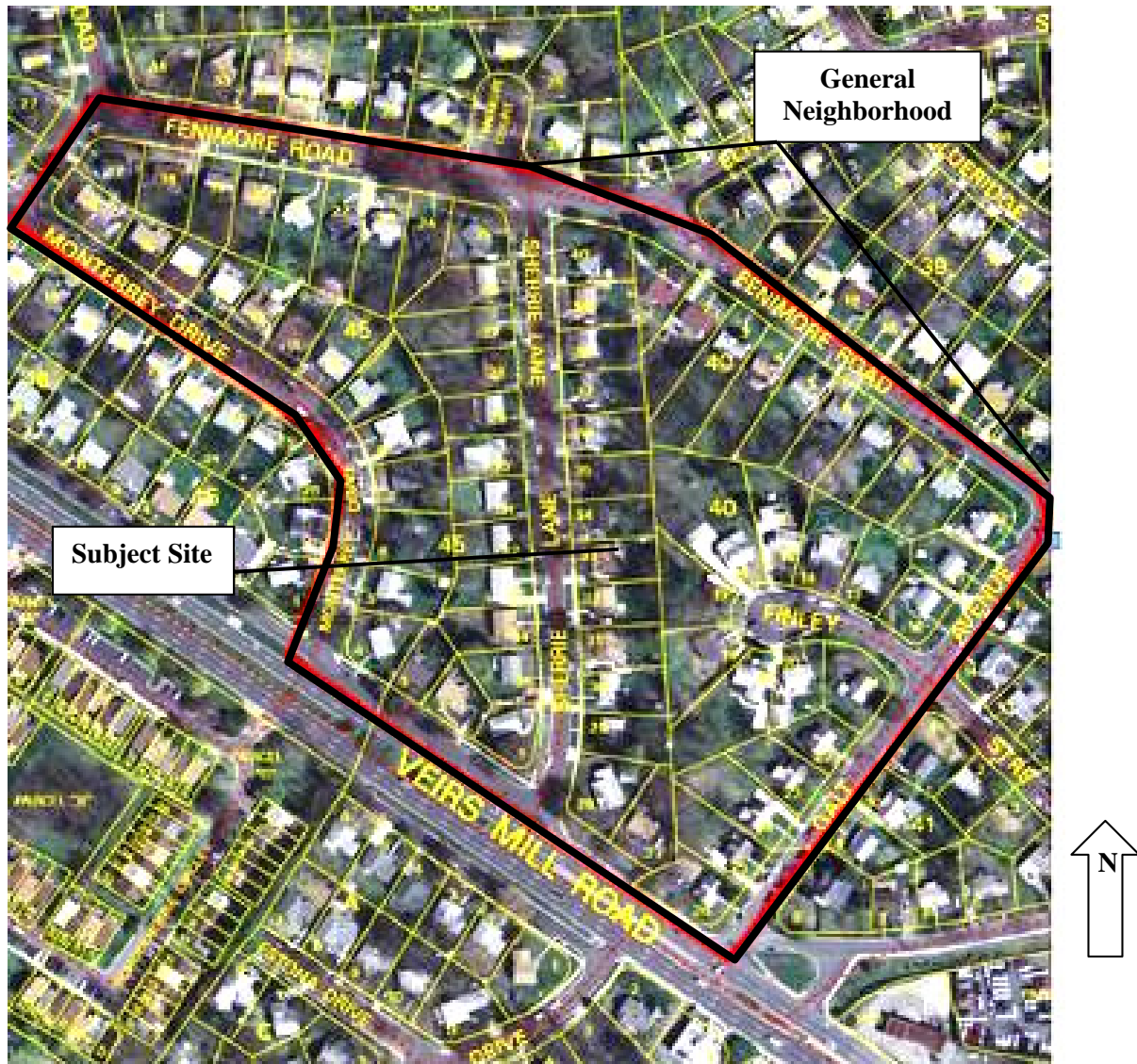
fence. The gate can be seen in the following photo from page 21 of the Staff report:



The rear yard is divided into two levels, separated by a low, brick retaining wall. As stated by Technical Staff, the rear yard is lushly landscaped with the upper part containing play equipment and a small shed, and the lower portion containing a concrete patio with a picnic table and toddler castle. It is depicted in the following photo from page 6 of the Staff report:



Technical Staff defined the general neighborhood as bordered by Fenimore road on the north, Monterrey Drive on the west, Veirs Mill Road on the south and Galt Avenue on the east, as shown below on the map from the Staff Report (Exhibit 28, p. 7):³



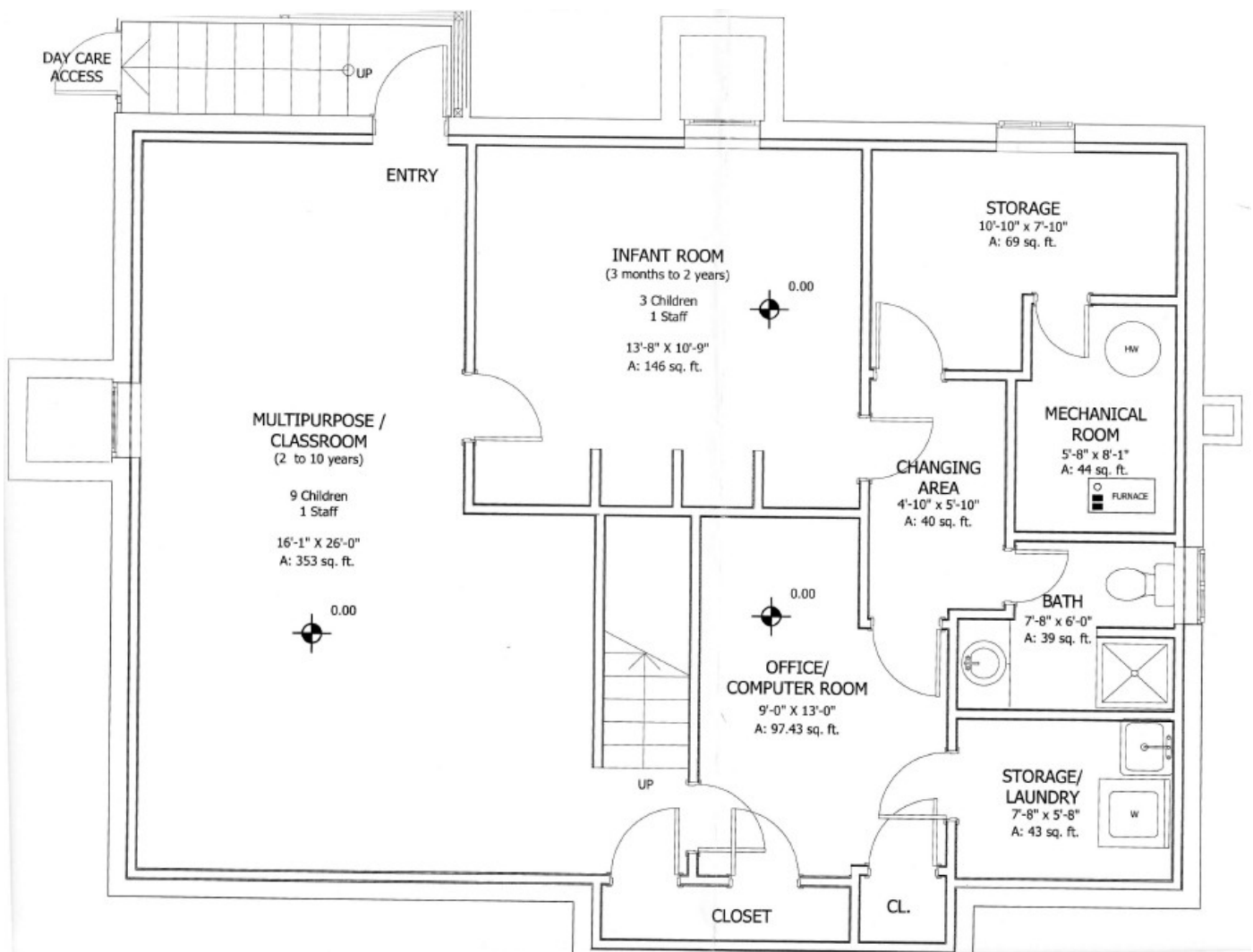
The Hearing Examiner accepts Technical Staff’s recommended definition of the general neighborhood. Staff describes the neighborhood as “characterized by single-family residential homes in the R-60 Zone,” which surround the subject site. Exhibit 28, p. 7.

³ The Staff report indicates that Monterrey Drive is on the east and Galt Avenue is on the west, but that is obviously reversed.

Technical Staff reports that the only other special exception in the general neighborhood is an accessory apartment use, approved in September of 2006, and located at 11305 Veirs Mill Road (northeast corner of the intersection of Veirs Mill Road and Sherrie Lane, approximately 260 feet south of the subject property). Exhibit 28, p. 15.

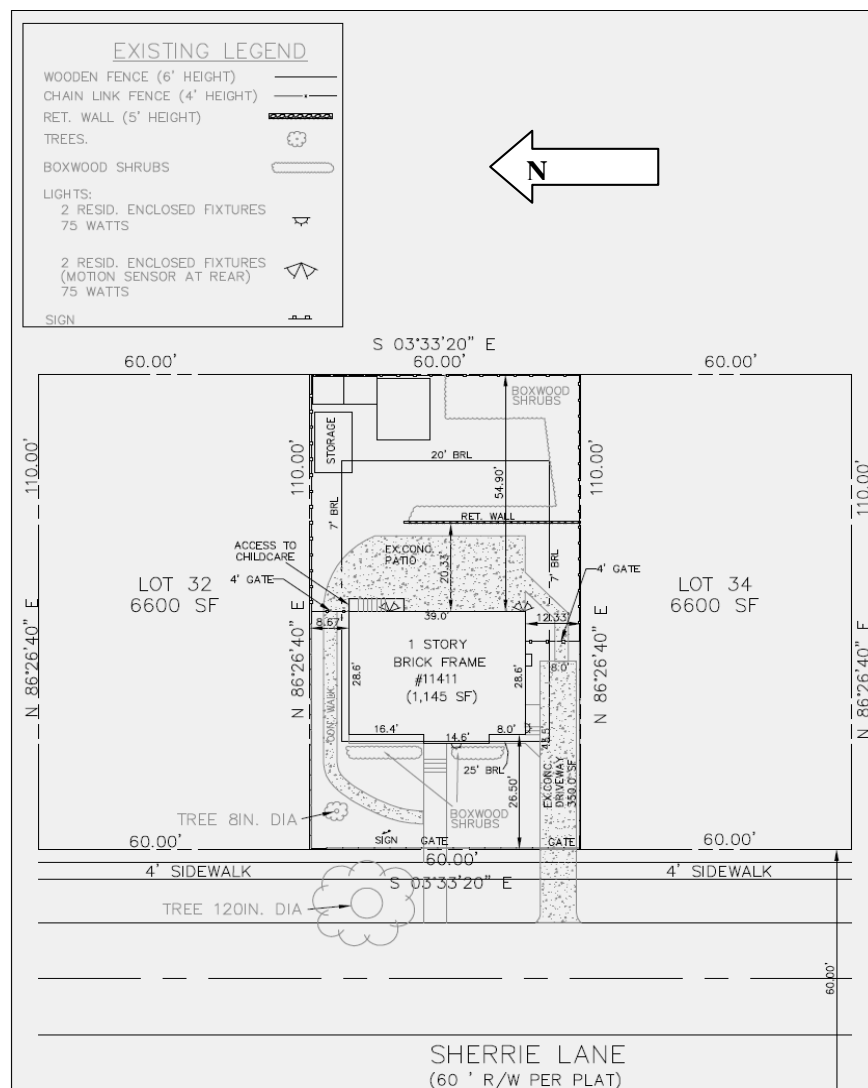
B. The Proposed Use, Landscaping, Lighting, Signage and the Environment

Petitioner proposes to expand the existing “family day care home” for up to 7 children into a “group day care home” for up to 12 children, ranging in age from under two, up to ten years old. The daycare will be located on the basement floor of the existing home, as depicted in the Childcare Floor Plan (Exhibit 13):



As shown, there are two rooms (total floor area of 499 square feet) that are used for the activities and play area for the children. The daycare rooms are labeled “Multipurpose/Classroom” and “Infant Room” on the above daycare floor plan. The combined square footage of these two rooms appears to exceed the state’s minimum requirement of 420 square feet for twelve children, but that determination will be made by state licensing authorities.⁴ None of the daycare business will be conducted on the second floor of the dwelling, which is Petitioner’s residence.

The revised Site Plan for the facility (Exhibit 31(a)) is reproduced below:



⁴ This figure is based on the State requirement, in COMAR 13A.14.02.17C, that a child care center licensed after December 1, 1971, must provide a minimum of 35 square feet of floor space for each child (12 X 35 = 420).

Petitioner currently possesses a license to operate a childcare facility for up to seven children (Exhibit 31(d)). She will amend her license to permit her to provide services for up to twelve children following the granting of this special exception application. As required under Code § 59-G-2.13.1(a)(4), the Petitioner has submitted an affidavit affirming that she will comply with all applicable State and County requirements (Exhibit 24). There will also be one non-resident employee, who will work from 7:30 a.m. to 6:30 p.m.

The hours of operation will be between 7:30 a.m. and 6:30 p.m., Monday through Friday. Child care will not be provided on weekends or overnight at any time. Petitioner will stagger arrival times for children between 7:30 a.m. and 9:30 a.m. during the morning drop-off, and between 4:30 p.m. and 6:30 p.m. during the afternoon pick-up. Tr. 49-50. Zoning Ordinance §59-E-3.7 requires that a group day care home provide one parking space for every non-resident staff member, in addition to the residential parking requirement, but allows the required number of spaces to be provided on the street abutting the site, as is proposed here. Pick-up and drop-offs will occur in front of the home, which, according to Technical Staff, provides adequate room for the morning drop-offs and afternoon pick-ups. As stated by Staff (Exhibit 28, pp. 19-20):

Three parking spaces (one space for staff and two spaces for the residential use) are required for the proposed use and the existing residential use. A total of two driveway parking spaces are provided. The applicant, who is also the owner of the property and residing on the second level of the subject dwelling, has indicated that the two spaces on the driveway will be used by herself and by the non-resident employee. The applicant indicated that she will instruct parents that they are to pick-up and drop-off children from the curbside along the property's frontage on Sherrie Lane. The property has 60 feet of frontage along Sherrie Lane, and it is estimated that at least two vehicles can comfortably be parked curbside along the frontage. There is no parking restriction on either side of Sherrie Lane. All of the houses located along Sherrie Lane have driveway parking areas, and therefore, the demand for street parking at this location is low.

. . . The applicant further indicated that no more than six children will be picked-up and dropped-off in any given one hour period. Given the

availability of ample on street parking in front of and near the property, and the fact that the arrival and departure times for children will be staggered over the course of two hours during the morning drop-off and evening pickup time, it is unlikely that the proposed use would generate a level of traffic or noise that would cause concern about congestion in the neighborhood.

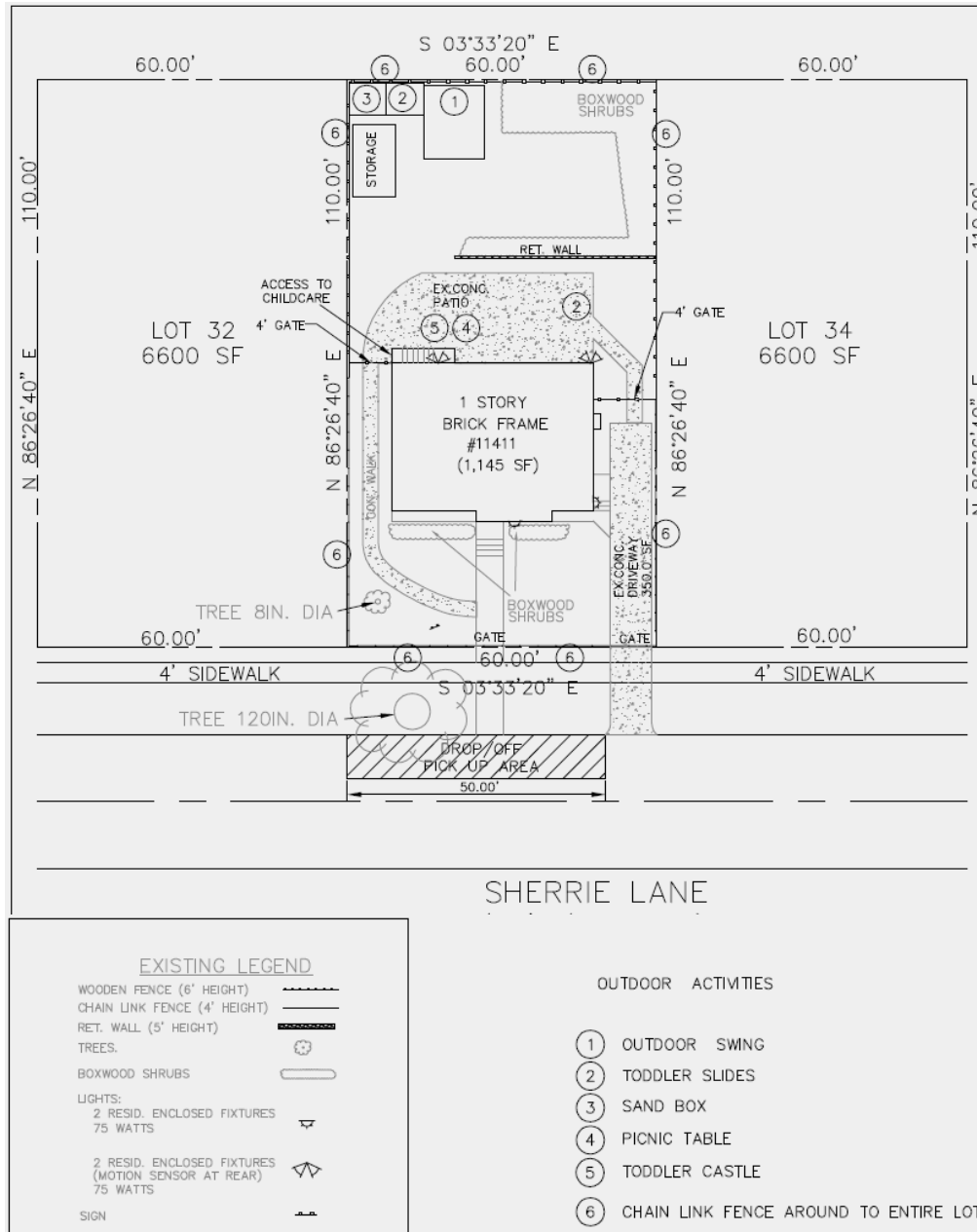
Staff also concluded “With the two driveway parking spaces and available on-street parking, adequate discharge and pick-up area is provided.” Exhibit 28, p. 20. This finding appears to be supported by the evidence, as demonstrated in a photo from page 11 of the Staff report:



The entrance for the daycare is on the east side (*i.e.*, rear) of the home, as shown in the site plan reproduced on page 9 of this Opinion. It is accessed through a walkway and a wooden gate on the north side of the home, which is depicted in the top photo on page 6 of this Opinion. Children of kindergarten age and lower will be accompanied by an adult directly to the rear entrance door, while older children may walk by themselves from the school bus stop at the intersection of Sherrie Lane and Fenimore Road, approximately 450 feet north of the day care, in accordance with the policy of the Montgomery County Board of Education, a copy of which is attached to Exhibit 23(a). Tr. 26-29.

However, for their first week at the facility, even the older children will be accompanied by an adult so that they can comfortably learn the location of the facility. Tr. 32-33. A condition to that effect is imposed in Part IV of this Opinion.

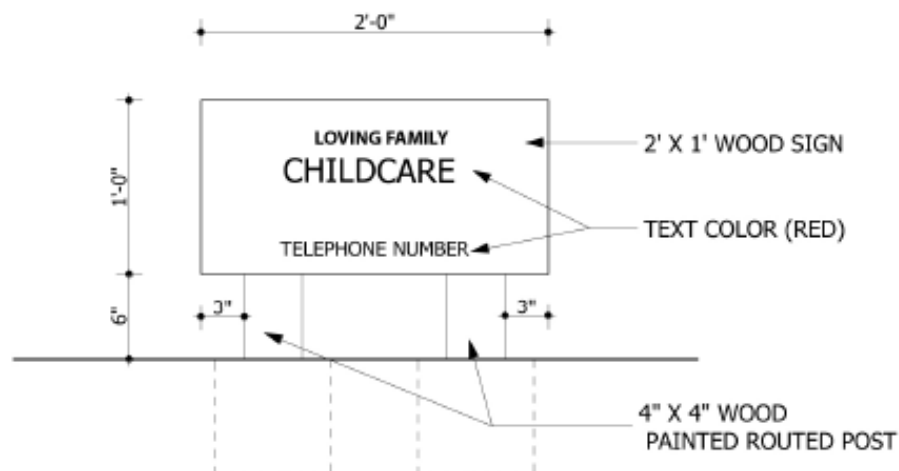
All of the activities associated with the business will be conducted within the home or in the back yard, which is enclosed by a six-foot wooden privacy fence. The rear yard has an existing swing set and other equipment which will be used by the children, and at no time will they be left outside without a childcare provider. The location of the outdoor equipment and other features are displayed on the revised Landscape and Lighting Plan (Exhibit 31(b)):



No more than 9 children shall be permitted to play outdoors at any one time. All gates or other access to the back yard must be secured during outdoor play in a manner that will prevent any of the children present from opening such access and wandering off. Tr. 40. The backyard is depicted in the bottom photo on page 6 of this opinion and in the following photo from page 21 of the Staff report:



A two-square-foot sign will be placed in the front yard (northwest side) of the property, next to the walkway, as depicted in the revised Sign Plan (Exhibit 31(c)). Tr. 60-61.



A permit must be obtained for the sign, and a condition has been imposed requiring Petitioner to file a copy of the permit with this office prior to posting the sign.

No lighting will be added to the exterior of the home; nor will there be any other changes made to the exterior. Tr. 54. It will therefore retain its residential appearance. Technical Staff found that the “[e]xisting lighting on the property is adequate and consistent with the residential character of the neighborhood.” Exhibit 28, p. 10. All of the lighting fixtures, which are a combination of dusk-to-dawn and motion-activated 75-watt residential lights, are mounted on the sides, front, and rear sides of the building. The lights are angled or boxed to minimize the glare onto adjoining properties.

As described by Technical Staff (Exhibit 28, pp. 10-11):

The front, rear and side yards are lushly landscaped with grass, flowers, ornamental trees and boxwood shrubs. Existing landscaping and grassy areas are well maintained, are in keeping with the residential character of the property, and promote compatibility with the residential neighborhood. . . . [T]he new fence will ensure adequate screening and buffering and provide an added safety and security element for the children.

There are no environmental issues in this case because there will be no exterior changes. This property is not located within a Special Protection Area or Primary Management Area, and there are no streams, wetlands, floodplains, or any associated buffers on the site. Exhibit 28, p. 10. Environmental Planning Staff noted that the site is exempted from forest conservation laws based on the size of the site, and they recommended approval of the special exception, without condition. Attachment to Exhibit 28. The Hearing Examiner agrees.

C. Master Plan Conformance and Compatibility with the Neighborhood

The subject site is within the area covered by the Kensington-Wheaton Master Plan, approved and adopted in 1989. As noted by Petitioner (Exhibit 10), the subject site is just outside the Wheaton Central Business District, and the Master Plan goals for this area include protecting, stabilizing and

maintaining the character and compatibility of existing residential and commercial land uses. Plan, p. 28. The proposed use would do so because no external changes are planned.

A separate section of the Master Plan is devoted to “Child Day Care Facilities.” Plan, pp. 137-139. The Plan observes that there is “a need for additional child day care facilities and opportunities” (Plan, p. 137) in Kensington-Wheaton, and states as the Plan’s objective, “To promote greater day care opportunities through appropriate land use recommendations and associated policies.” Plan, p. 139.

Technical Staff reports that Community-Based Planning staff found the proposed special exception to be consistent with the Approved and Adopted 1989 Master Plan for the Communities of Kensington-Wheaton. “The Plan supports the use of a Child Care Facility through a special exception to meet the needs of working parents in the area.” Exhibit 28, p. 8. The Master Plan also recommends continuation of the R-60 Zone, which permits group day care homes by special exception.

In light of all these factors, it is fair to say that the proposed use is consistent with the objectives and recommendations of the Kensington-Wheaton Master Plan.

D. Site Access, Traffic and Safety

Vehicular access to the subject property will be from Sherrie Lane via the home’s driveway, which can hold two cars, and from on-street parking in front of the home. The proposed use will not change the vehicular site access or on-street parking. Pedestrian access is via sidewalks, which are present on both sides of Sherrie Lane, the street fronting the house. The proposed group day care will not change the existing pedestrian facilities.

Transportation Staff expressly found that the proposed use “will have no adverse effect on area roadway conditions or nearby pedestrian facilities.” April 15, 2009 Memorandum attached to Exhibit 28. Transportation Staff also found that the proposal satisfies both the Local Area Transportation Review (LATR) and Policy Area Mobility Review (PAMR). Exhibit 28, pp. 8-9.

The numbers of trips anticipated from the proposed use are set forth in the following table from the Technical Staff report (Exhibit 28, p. 9):

Table 1 – Site Trip Generation

Land Use		Weekday Peak-Hour Trips	
		AM	PM
Single Family Home (Existing)		2*	2*
Day care facility (Existing)	7 children	7	7
	1 employee	1	1
Pass-by and diverted trips **		(6)	(6)
Subtotal, existing primary trips		4	4
Day care facility (Proposed)	5	5	5
Pass-by and diverted trips **		(3)	(3)
Subtotal, new primary trips		2	2
Total trips		15	15

*The Traffic statement states that 2 peak hour trips are created by the residence, where the standard LATR rate is 1.1 trips per dwelling unit. As the difference is not material to the outcome, the discrepancy is merely noted.

** LATR Pass by rates are 27% (AM) 12% (PM). Diverted trip rates are 41% (AM) and 61% (PM). Pass-by and diverted trips are trips that are already on the road network but either pass by or are diverted to the site and are not counted towards mitigation requirements.

Because the use is expected to generate fewer than 30 additional peak-hour trips during the morning (6:30 to 9:30 AM) and evening (4:00 to 7:00 PM) weekday peak periods, an LATR traffic study was not required.

As to PAMR, the *FY 2007-2009 Growth Policy* classified the Kensington/Wheaton Policy area as “acceptable with partial mitigation.” PAMR thus requires an applicant to mitigate 15% of its new vehicle trips. In this case, because of the number of pass-by and diverted trips, the number of new primary trips amounts to only two in the morning and two in the evening. Fifteen percent of those figures amounts to less than half a trip mitigation in each case. Moreover, because the use will generate fewer than four new peak hour primary trips in each peak period, Technical Staff determined

that the application is exempt from the Growth Policy PAMR test and that no mitigation is required in this case. Exhibit 28, p. 9.

There being no evidence to the contrary, the Hearing Examiner accepts these findings. Based on all the evidence, the Hearing Examiner finds that the proposed use provides safe access to the proposed Day Care facility, satisfies LATR and PAMR and will not create a nuisance because of traffic.

E. Community Reaction

There was no opposition to the proposed day care center. The Office of the People's Counsel supports this special exception and the six conditions recommended by Technical Staff. Tr. 6.

III. FINDINGS AND CONCLUSIONS

A special exception is a zoning device that authorizes certain uses provided that pre-set legislative standards are met, that the use conforms to the applicable master plan, and that it is compatible with the existing neighborhood. Each special exception petition is evaluated in a site-specific context because a given special exception might be appropriate in some locations but not in others. The zoning statute establishes both general and specific standards for special exceptions, and the Petitioner has the burden of proof to show that the proposed use satisfies all applicable general and specific standards. Technical Staff concluded that Petitioner will have satisfied all the requirements to obtain the special exception, if she complies with the recommended conditions (Exhibits 28).

Weighing all the testimony and evidence of record under a “preponderance of the evidence” standard (Zoning Ordinance §59-G-1.21(a)), the Hearing Examiner concludes that the instant petition meets the general and specific requirements for the proposed use, as long as Petitioner complies with the conditions set forth in Part IV, below.

A. Standard for Evaluation

The standard for evaluation prescribed in Code § 59-G-1.2.1 requires consideration of the inherent and non-inherent adverse effects on nearby properties and the general neighborhood from the proposed use at the proposed location. Inherent adverse effects are “the physical and operational characteristics necessarily associated with the particular use, regardless of its physical size or scale of operations.” Code § 59-G-1.2.1. Inherent adverse effects, alone, are not a sufficient basis for denial of a special exception. Non-inherent adverse effects are “physical and operational characteristics not necessarily associated with the particular use, or adverse effects created by unusual characteristics of the site.” *Id.* Non-inherent adverse effects, alone or in conjunction with inherent effects, are a sufficient basis to deny a special exception.

Technical Staff have identified seven characteristics to consider in analyzing inherent and non-inherent effects: size, scale, scope, light, noise, traffic and environment. For the instant case, analysis of inherent and non-inherent adverse effects must establish what physical and operational characteristics are necessarily associated with a “group day care home” use. Characteristics of the proposed “Loving Family Childcare” facility that are consistent with the “necessarily associated” characteristics of group day care home uses will be considered inherent adverse effects, while those characteristics of the proposed use that are not necessarily associated with group day care home uses, or that are created by unusual site conditions, will be considered non-inherent effects. The inherent and non-inherent effects thus identified must then be analyzed, in the context of the subject property and the general neighborhood, to determine whether these effects are acceptable or would create adverse impacts sufficient to result in denial.

Technical Staff identified the following inherent characteristics of a group day care home (Exhibit 28, p. 10):

- (1) the dwelling housing the group day care;
- (2) parking, (if meets the required numbers);
- (3) lighting;
- (4) noise generated by children;
- (5) drop-off and pick-up areas;
- (6) hours of operation;
- (7) number of staff and children; and
- (8) vehicular trips to and from the site.

The Hearing Examiner agrees with this listing of the inherent characteristics of a group daycare facility. Technical Staff felt that the existence of only two off-street parking spaces was a non-inherent characteristic of the site because three parking spaces are required by Zoning Ordinance §59-E-3.7. That is a close call because the applicable section expressly provides that, in the case of a family day care home or group day care home, “The required number of spaces may be allowed on the street abutting the site.” Ultimately, the Hearing Examiner agrees with Staff on this point because the statute uses the words, “may be allowed,” which implies that the deciding official may determine that on-street parking is not appropriate in a particular case.

In any event, there is no evidence that the on-street parking provided here would be inappropriate. On the contrary, Technical Staff found that at least two vehicles can comfortably be parked curbside along the frontage; that there is no parking restriction on either side of Sherrie Lane; that all of the houses located along Sherrie Lane have driveway parking areas; and that therefore the demand for street parking at this location is low. Exhibit 28, p. 11. Staff concluded, “Provided that the recommended conditions are complied with, there will be no inherent or non-inherent impacts associated with the subject proposal that warrant denial.” Exhibit 28, p. 11. The Hearing Examiner agrees and so finds.

The relevant characteristics of the proposed use are consistent with the inherent characteristics identified for a group day care home. The building is not of an unusual size or design, but rather is an existing one-family residence in a residential area; the outdoor play area is fenced and screened, and the number of children using it at one time would be limited; the only additional on-street spaces needed are available in front of Petitioner's home; lighting is residential in style and will not be increased for this special exception; and the amount of traffic generated would not be unusual (or even sufficient to generate a traffic study under the LATR). The Hearing Examiner concludes that the proposed special exception will have no non-inherent adverse effects and will not result in any adverse impacts upon the neighborhood, if the specified conditions are followed.

B. Specific Standards

The specific standards for Child Day Care Facilities are found in Code § 59-G-2.13.1. The Technical Staff report, together with the Petitioner's written evidence and testimony, provide adequate evidence that the specific standards would be satisfied in this case, as outlined below.

Sec. 59-G-2.13.1. Child day care facility.

- (a) *The Hearing Examiner may approve a child day care facility for a maximum of 30 children if:*
 - (1) *a plan is submitted showing the location of all buildings and structures, parking spaces, driveways, loading and unloading areas, play areas, and other uses on the site;*

Conclusion: The submitted Site Plan (Exhibit 31(a)), Landscape and Lighting Plan (Exhibit 31(b)) and Floor Plans (Exhibit 13 and 14), satisfy this requirement.

- (2) *parking is provided in accordance with the parking regulations of article 59-E. The number of parking spaces may be reduced by the Hearing Examiner if the applicant demonstrates that the full number of spaces required in section 59-E-3.7 is not necessary because:*

- (A) *existing parking spaces are available on adjacent property or on the street abutting the site that will satisfy the number of spaces required; or*
- (B) *a reduced number of spaces would be sufficient to accommodate the proposed use without adversely affecting the surrounding area or creating safety problems;*

Conclusion: Code § 59-E-3.7 requires that a group day care home provide one parking space for every non-resident staff member in addition to the residential parking requirement, but allows the required number of spaces to be provided on the street abutting the site. In this case, there are two off-street spaces in the driveway and two on-street spaces on Sherrie Lane in front of the residence. The Hearing Examiner finds the parking to be sufficient because there will be a maximum of one non-resident staff, and conditions will require Petitioner to provide one off-street parking space for one staff member during all hours of operation and to stagger drop-offs and pickups so that no more than six vehicles visit the site within any one hour period to drop off or pick up children. With these conditions, the Hearing Examiner concludes that the two off-street spaces and two on-street spaces on Sherrie Lane will be sufficient.

- (3) *an adequate area for the discharge and pick up of children is provided;*

Conclusion: As previously discussed, Technical Staff found site access to be safe and adequate and the number of available parking spaces adequate to accommodate the proposed child daycare facility. Exhibit 28, p. 20. The Hearing Examiner so finds.

- (4) *the petitioner submits an affidavit that the petitioner will:*
 - (A) *comply with all applicable State and County requirements;*
 - (B) *correct any deficiencies found in any government inspection; and*
 - (C) *be bound by the affidavit as condition of approval for this special exception; and*

Conclusion: The required affidavit has been submitted (Exhibits 24).

- (5) *the use is compatible with surrounding uses and will not result in a nuisance because of traffic, parking, noise or type of physical activity. The hearing examiner may require landscaping and screening and the submission of a plan showing the location, height, caliper, species, and other characteristics, in order to provide a physical and aesthetic barrier to protect surroundings properties from any adverse impacts resulting from the use.*

Conclusion: As discussed in Part II of this Opinion and Decision, the evidence demonstrates that the proposed use would be compatible with surrounding uses and would not result in a nuisance because of traffic or parking. As to noise and physical activity, it should be noted that the back yard is fenced and landscaped, so any noise would be mitigated, and the Hearing Examiner has included conditions prohibiting any amplified sound in the back yard and limiting the number of children outside at any one time. Operations are limited to normal work hours, and the facility will not operate in the evenings or on weekends, so the impact on the neighborhood is reduced. Technical Staff found that, “with the recommended conditions, the use will be compatible with surrounding uses and will not result in nuisance because of traffic, parking, noise or any type of physical activity.” Exhibit 28, p. 20. The Hearing Examiner agrees and so finds.

- (b) *A child day care facility for 31 or more children may be approved by the Board of Appeals subject to the regulations in subsection (a) above, and the following additional requirements: . . .*

Conclusion: Not applicable.

- (c) *The requirements of section 59-G-2.13.1 do not apply to a child day care facility operated by a nonprofit organization and located in: . . .*

Conclusion: Not applicable.

C. General Standards

The general standards for a special exception are found in Code § 59-G-1.21(a). The Technical Staff report, the exhibits and the testimony of the Petitioner provide ample evidence that the general standards would be satisfied in this case.

Sec. 59-G-1.21. General conditions.

§5-G-1.21(a) *-A special exception may be granted when the Board, the Hearing Examiner, or the District Council, as the case may be, finds from a preponderance of the evidence of record that the proposed use:*

(1) Is a permissible special exception in the zone.

Conclusion: A group day care home use is a permissible special exception in the R-60 Zone, pursuant to Code § 59-C-1.31(d).

(2) Complies with the standards and requirements set forth for the use in Division 59-G-2. The fact that a proposed use complies with all specific standards and requirements to grant a special exception does not create a presumption that the use is compatible with nearby properties and, in itself, is not sufficient to require a special exception to be granted.

Conclusion: The proposed use complies with the specific standards set forth in § 59-G-2.13.1 for a Child Day Care Facility use as outlined in Part III. B, above.

(3) Will be consistent with the general plan for the physical development of the District, including any master plan adopted by the Commission. Any decision to grant or deny special exception must be consistent with any recommendation in a master plan regarding the appropriateness of a special exception at a particular location. If the Planning Board or the Board's technical staff in its report on a special exception concludes that granting a particular special exception at a particular location would be inconsistent with the land use objectives of the applicable master plan, a decision to grant the special exception must include specific findings as to master plan consistency.

Conclusion: The subject site is within the area covered by the Kensington-Wheaton Master Plan,

approved and adopted in 1989. For all the reasons set forth in Part II. C. of this Opinion, the Hearing Examiner finds that the proposed use is consistent with the objectives and recommendations of the Kensington-Wheaton Master Plan.

(4) Will be in harmony with the general character of the neighborhood considering population density, design, scale and bulk of any proposed new structures, intensity and character of activity, traffic and parking conditions, and number of similar uses. The Board or Hearing Examiner must consider whether the public facilities and services will be adequate to serve the proposed development under the Growth Policy standards in effect when the special exception application was submitted.

Conclusion: The proposed group day care home will be in harmony with the general residential character of the neighborhood because it will be housed in an existing single-family home, and there will be no external changes to that structure. The rear yard play area is completely fenced in and well screened by landscaping. The parking is adequate, and can handle the pick-up and drop-off of children. There are no other group day care homes in the general neighborhood, so there is clearly not an excess of similar uses. On the contrary, the Master Plan recognizes a need for child day care in the area.

Technical Staff also determined that “The proposed use will be adequately served by existing public facilities.” Exhibit 28, p. 16. The Hearing Examiner so finds.

(5) Will not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.

Conclusion: The Hearing Examiner concludes that the proposed use will not be detrimental to the peaceful enjoyment, economic value or development of surrounding properties at the site.

As noted above, the proposed use will have almost no physical impact on the nearest residences. On the positive end, it will provide a service needed by the neighborhood.

- (6) *Will cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare, or physical activity at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: Based on the nature of the use, it will not cause objectionable vibrations, fumes, odors and dust. As discussed in Part III.B of this Opinion, the special exception, as conditioned, will cause no objectionable noise or physical activity at the subject site. Technical Staff found that “[e]xisting lighting on the property is adequate and consistent with the residential character of the neighborhood.” Exhibit 28, p. 10. No new lighting will be added, and operations cease at 6:30 p.m. The Hearing Examiner therefore finds that there will not be objectionable illumination or glare at the site as a result of the special exception.

- (7) *Will not, when evaluated in conjunction with existing and approved special exceptions in any neighboring one-family residential area, increase the number, intensity, or scope of special exception uses sufficiently to affect the area adversely or alter the predominantly residential nature of the area. Special exception uses that are consistent with the recommendations of a master or sector plan do not alter the nature of an area.*

Conclusion: Technical Staff reports only one other special exception in the neighborhood, an accessory apartment use located at 11305 Veirs Mill Road. The Hearing Examiner finds that the group day care home proposed in this case will not increase the number, scope, or intensity of special exception uses sufficiently to affect the area adversely or alter the nature of the area. Moreover, as previously discussed, the proposed use is consistent with the recommendations of the applicable Master Plan, and therefore,

under the terms of this criterion, will not alter the nature of the area.

- (8) *Will not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: The evidence supports the conclusion that the proposed group day care home will not be a danger to public health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site. On the contrary, it will provide a needed service to the public.

- (9) *Will be served by adequate public services and facilities including schools, police and fire protection, water, sanitary sewer, public roads, storm drainage and other public facilities.*

Conclusion: Technical Staff reports that “The proposed use will be adequately served by existing public facilities.” Exhibit 28, p. 16. There is no contrary evidence, and the Hearing Examiner so finds.

- (A) *If the special exception use requires approval of a preliminary plan of subdivision, the Planning Board must determine the adequacy of public facilities in its subdivision review. In that case, approval of a preliminary plan of subdivision must be a condition of granting the special exception.*
- (B) *If the special exception does not require approval of a preliminary plan of subdivision, the Board of Appeals must determine the adequacy of public facilities when it considers the special exception application. The Board must consider whether the available public facilities and services will be adequate to serve the proposed development under the Growth Policy standards in effect when the application was submitted.*

Conclusion: The special exception sought in this case would not require approval of a preliminary plan of subdivision. Therefore, the Hearing Examiner must determine the adequacy

of public facilities, including Local Area Transportation Review (“LATR”) and Policy Area Mobility Review (“PAMR”). Technical Staff reviewed these issues and found that both LATR and PAMR are satisfied, as discussed in Part II. D. of this Opinion. For the reasons set forth in Part II. D. of this Opinion and Decision, the Hearing Examiner agrees with their conclusions.

(C) *With regard to public roads, the Board or the Hearing Examiner must further find that the proposed development will not reduce the safety of vehicular or pedestrian traffic.*

Conclusion: Technical Staff found that “[t]he use as proposed is not likely to reduce the safety of vehicular or pedestrian traffic.” Exhibit 28, p. 16. For the reasons set forth in Part II. D. of this Opinion and Decision, the evidence of record supports that finding, and the Hearing Examiner therefore concludes that the proposed use would have no detrimental effect on the safety of vehicular or pedestrian traffic.

D. Additional Applicable Standards

59-G § 1.23. General development standards

(a) ***Development Standards.*** *Special exceptions are subject to the development standards of the applicable zone where the special exception is located, except when the standard is specified in Section G-1.23 or in Section G-2.*

Conclusion: The proposed use meets the development standards of the R-60 Zone, as shown in the following Table from Page 17 of the Technical Staff report:

Development Standard: R-60 Zone	Required	Proposed
Minimum Lot Area	6,000 sf	6,600 sf
Minimum Lot width:		
▪ at front building line	60 ft	60 ft
▪ at street line	25 ft	60

Minimum Building Setback:		
Front Yards	25 ft	26.50 ft
Side Yards		
▪ One side	8 ft	8.67
▪ Sum of both sides	18 ft	21.00
Rear Yard	20 ft	54.90
Maximum Building Height	2 ½ stories or 35 ft	2 stories \pm 24 ft
Maximum Building Coverage	35%	17%

- (b) ***Parking requirements.*** *Special exceptions are subject to all relevant requirements of Article 59-E.*

Conclusion: Zoning Ordinance §59-E-3.7 requires that a group day care home provide one parking space for every non-resident staff member, in addition to the residential parking requirement, but allows the required number of spaces to be provided on the street abutting the site. As noted in Part II. B. and elsewhere in this Opinion, the Hearing Examiner finds that there is sufficient parking to meet the code requirements and to insure safety.

- (c) ***Minimum frontage.*** *In the following special exceptions the Board may waive the requirement for a minimum frontage at the street line if the Board finds that the facilities for ingress and egress of vehicular traffic are adequate to meet the requirements of section 59-G-1.21:*
- (1) *Rifle, pistol and skeet-shooting range, outdoor.*
 - (2) *Sand, gravel or clay pits, rock or stone quarries.*
 - (3) *Sawmill.*
 - (4) *Cemetery, animal.*
 - (5) *Public utility buildings and public utility structures, including radio and T.V. broadcasting stations and telecommunication facilities.*
 - (6) *Riding stables.*
 - (7) *Helipport and helistop.*

Conclusion: This special exception is not included in the above list. Moreover, the proposed use will not result in any change in the site's frontage, which meets required standards.

- (d) ***Forest conservation.*** *If a special exception is subject to Chapter 22A, the Board must consider the preliminary forest conservation plan required by that Chapter when approving the special exception*

application and must not approve a special exception that conflicts with the preliminary forest conservation plan.

Conclusion: Technical Staff determined that this project is exempt from the forest conservation regulations (Exhibits 28, p. 18). No trees will be removed.

- (e) ***Water quality plan.*** *If a special exception, approved by the Board, is inconsistent with an approved preliminary water quality plan, the applicant, before engaging in any land disturbance activities, must submit and secure approval of a revised water quality plan that the Planning Board and department find is consistent with the approved special exception. Any revised water quality plan must be filed as part of an application for the next development authorization review to be considered by the Planning Board, unless the Planning Department and the department find that the required revisions can be evaluated as part of the final water quality plan review.*

Conclusion: Inapplicable. This provision applies only to sites where there will be land disturbance within a Special Protection Area, which is not the case here.

- (f) ***Signs.*** *The display of a sign must comply with Article 59-F.*

Conclusion: Petitioner proposes an unlighted sign measuring 2 square feet. A condition has been imposed which provides that Petitioner may display one unlighted sign of up to two square feet as depicted on the Sign Plan (Exhibit 31(c)), if it is approved by the Department of Permitting Services and a permit is obtained. A copy of the permit must be filed with OZAH before the sign is posted.

- (g) ***Building compatibility in residential zones.*** *Any structure that is constructed, reconstructed or altered under a special exception in a residential zone must be well related to the surrounding area in its siting, landscaping, scale, bulk, height, materials, and textures, and must have a residential appearance where appropriate. Large building elevations must be divided into distinct planes by wall offsets or architectural articulation to achieve compatible scale and massing.*

Conclusion: There will be no external building modifications, so the building will maintain its residential character.

(h) ***Lighting in residential zones.*** All outdoor lighting must be located, shielded, landscaped, or otherwise buffered so that no direct light intrudes into an adjacent residential property. The following lighting standards must be met unless the Board requires different standards for a recreational facility or to improve public safety:

(1) *Luminaires must incorporate a glare and spill light control device to minimize glare and light trespass.*

(2) *Lighting levels along the side and rear lot lines must not exceed 0.1 foot candles.*

Conclusion: Technical Staff found that “[e]xisting lighting on the property is adequate and consistent with the residential character of the neighborhood.” Exhibit 28, p. 10.

No new lighting will be added, and operations cease at 6:30 p.m. The Hearing Examiner therefore finds that there will not be objectionable illumination or glare at the site as a result of the special exception.

Based on the testimony and evidence of record, I conclude that the group day care home use proposed by Petitioner, as conditioned below, meets the specific and general requirements for the special exception, and that the Petition should be granted, subject to the conditions set forth in Part IV of this Opinion and Decision.

IV. DECISION

Accordingly, based on the foregoing findings and conclusions, Petition No. S.E. 09-2 for a special exception in the R-60 Zone to operate a group day care home for up to 12 children in an existing single-family detached home, at 11411 Sherrie Lane, Wheaton, Maryland, is **GRANTED** subject to the following conditions:

1. The Petitioner shall be bound by all of her testimony and exhibits of record, and by the representations of counsel identified in this Opinion and Decision.
2. Petitioner must comply with all Maryland State and Montgomery County licensure requirements and standards for the operation of a group day care home.

3. In accordance with Code § 59-G-2.13.1(a)(4), the Petitioner shall be bound by the Affidavit of Compliance submitted in connection with this case, Exhibit 24, in which Petitioner certified that she will comply with and satisfy all applicable State and County requirements, correct any deficiencies found in any government inspection, and be bound by the affidavit as a condition of approval for the special exception.
4. The number of children enrolled at the center shall not exceed 12 children; nor shall it exceed the number of children authorized by State licensing authorities. The children's ages shall not exceed 10 years of age, and there is a maximum of three children under the age of two.
5. Hours of operation shall be limited to 7:30 a.m. to 6:30 p.m., Monday through Friday.
6. The group day care home may have no more than one non-resident staff member.
7. Arrival and departure times for the children shall be staggered between 7:30 a.m. and 9:30 a.m. and between 4:30 p.m. and 6:30 p.m. respectively through contractual agreement between the operator of the day care home and the parents, so that no more than six vehicles visit the site within any one hour period to drop-off or pick-up children. In no event may a child be dropped off before Petitioner or a staff member is present to supervise that child; nor may a child be left alone if a parent is late in making a pick-up.
8. Children of kindergarten age or younger must be escorted to the child care entrance on the rear of the home by an adult. Older children must be accompanied by an adult to the child care entrance for their first week at the facility, so that they can comfortably learn the location.
9. The Petitioner shall not use a public address system of any kind outside the building, nor shall any amplified music be played outside the building.

10. All children must be under the direct supervision of a staff member at all times, both inside and outside the building. No more than 9 children shall be permitted to play outdoors at any one time. All gates or other access to the back yard must be secured during outdoor play in a manner that will prevent any of the children present from opening such access and wandering off.
11. The Petitioner shall maintain the grounds in a clean condition, free from debris, on a daily basis.
12. Zoning Ordinance §59-E-3.7 requires that a group day care home provide one parking space for every non-resident staff member in addition to the residential parking requirement, but allows the required number of spaces to be provided on the street abutting the site. In this case, there will be one non-resident staff, and Petitioner must provide one off-street parking space for one staff member during all hours of operation. Pick-ups and Drop-offs may be made at the on-street parking space in front of the home.
13. Petitioner must provide all the fencing and landscaping depicted on the Site, Landscape and Lighting Plans (Exhibits 31(a) and (b)).
14. Petitioner may display one unlighted sign of up to two square feet as depicted on the Sign Plan (Exhibit 31(c)), if it is approved by the Department of Permitting Services and a permit is obtained. A copy of the permit should be filed with OZAH before the sign is posted.
15. Petitioner must obtain and satisfy the requirements of all licenses and permits, including but not limited to building permits and use and occupancy permits, necessary to occupy the special exception premises and operate the special exception as granted herein. Petitioner shall at all times ensure that the special exception use and premises comply with all

applicable codes (including but not limited to building, life safety and handicapped accessibility requirements), regulations, directives and other governmental requirements.

Dated: July 21, 2009



Martin L. Grossman
Hearing Examiner

NOTICE OF RIGHT TO APPEAL

Any person, board, association, corporation or official aggrieved by a decision of the Hearing Examiner under this section may, within ten days after this decision is rendered, appeal the decision to the County Board of Appeals in accordance with the provisions of Section 59-G-1.12(g) of the Zoning Ordinance.

cc: All Parties of Record